

# Considerations over the right to life and the use of fire-arms within ECHR legislation and Romanian jurisprudence

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*Abstract:* - As the European Court of Human Rights states, the right to life is a fundamental human right. It is assigned as essential in the protection system of rights and freedoms established within the European Convention. If what the law limits the right to life, jurisprudence is perhaps not very clear; in exchange, in terms of content, the Court decided, using the teleological interpretation, that state obligations regard on one hand, no death causing through intentional action, and on the other hand, protection of life by taking necessary measures. In this respect, the Romanian legislation has the obligation to comply with the related European jurisprudence.

*Key-Words:* - ECHR, life protection, fire-arms, human right, freedom, use of force, criminal law

## 1 Introduction

The right to life and the use of fire-arms by the state authorities that assure public order has become of present interest within ECHR jurisprudence. The importance of the law regulations stipulated by article 2 has been frequently underlined by the Court. Even from the first case directly related with the above-mentioned article, the Court mentioned that the article is “one of the foremost articles of the Convention, which no impairment would be authorized of, in time of peace, according with article 15. (...) The article assigns one of the fundamental worth of democratic societies which form the European Council (...).” [1]

## 2 Use of force

According to paragraph 2 of Article 2, death is not regarded as inflicted in contravention with the Convention in cases where it results from the use of force, for limited purposes specified in this treaty provision. Therefore, the Convention requires to the member states the negative substantial obligation to avoid excessive use of legal force; the use of force must be absolutely necessary to achieve those goals. As it arises from the wording of Article 2 of the Convention, the use of force must satisfy two conditions: on one hand, it must aim the purposes limited set out in paragraph 2 letters a) - c) [2] and,

on the other hand, it must be absolutely necessary to achieve this goal.

### 2.1 Purposes for the use of force

The circumstances under which a „person’s” right to life can be affected are listed exhaustively in paragraph 2 of Article 2 and must be interpreted narrowly. [3]

#### 2.1.1 The absolutely necessary force to assure the defence of any person from unlawful violence.

This treaty provision stipulates what is called „self-defence” within the Romanian criminal law. Yet a slight discrepancy between the national legislation and the European Convention regulations can be observed. Thus, within the Convention, this limitation of the right to life regards only the legitimate defence of the person, either self or others, protection of property being excluded from the beginning. [4]

In contrast, under Article 44 of the Criminal Code, in self-defence is one who commits an act to remove direct, immediate and unjust material attack turned against him, against other person or against a public good and that puts in serious danger the person or the rights of the attacked person or the public good. As shown in the expertise literature, by this provision are protected against attack both social values related to the person: life, her bodily integrity

and health, freedom, dignity [5] and also other individual rights different than those intimately related to the physical and moral existence, but which are important legal means to conduct a normal individual and social existence, such as: inviolability of residence, ownership right, right to inheritance, right to own something, etc [6] Consequently, within internal law, self-defence, even if it resulted in killing a person, is justified not only when the attack on the person being in self-defence, but also when it refers to the social values that have no concern with the person defending. In the latter case, the internal law does not correspond to the European Convention regulations.

### **2.1.2 The absolutely necessary force to perform a lawful arrest or to prevent the escape of a lawfully detained person**

With regard to this provision of the European Convention, the doctrine states that „the use of arms to operate an arrest or to prevent the performance of an escape must never start from the intention to kill. Death can not occur, except perhaps as an unintended consequence of such use” [7]

Regarding the use of force to make an arrest, the Court decided that „only in subparagraphs (a) and (c) of Article 2 paragraph 2, violence is specifically mentioned as a condition that can justify the use of potentially lethal force. However, strict proportionality principle established by Article 2 of the Convention can not be dissociated from the scope of this provision: protection of life. This implies that a similar condition also applies to cases of subparagraph (b)”. [8] Therefore, based on this principle, the Court concluded that the use of lethal force to perform a lawful arrest can not be justify in any conditions „under any circumstances, the use of firearms can not be absolutely necessary, as described within Article 2 paragraph 2 of the Convention, to arrest a person suspected of committing a crime without violence, a person who is known not to pose a threat to others lives, even when failure to use such weapons would lead to losing the opportunity to arrest the fugitive” [9]

In the most recent court case, Soare and others versus Romania, [10] it is ascertained, inter alia, the breach of article 2 of the ECHR. In fact, on May, 19th 2000, Mugurel Soare, then aged 19, was beaten and shot in the head by a policeman in civilian clothes. The incident happened at around 19.00 in the street (near Caritas Hospital in Bucharest), in the presence of eyewitnesses. The victim „guilt” was the run down the street after his brother-in-law that abandoned his wife (Mugurel’ sister) and his baby. Transported to the Emergency Hospital, Mugurel

Soare was in a coma for five days, then he suffered surgery, finally remaining paralyzed on the right side of his body and with very serious impairment and speech centre. After several treatments he regained, to a large extent, the ability to move himself without help, but not the gift of speech, a disability that profoundly affected his life and family.

On May 19th , 2000 event there were also present two eyewitnesses who were illegally deprived of liberty (they were kept for 10 hours in police headquarters for „statements”) and ill-treated (remained in police headquarters during the night of 19 to 20, without water and food, under constant psychological pressure to induce favourable statements for police use). After the exhaustion of domestic remedies, the two eyewitnesses addressed together with Mugurel Soare to the ECHR.

The European Court examined the complaint of the first claimant on grounds of Article 2 of the European Convention that protects the right to life and criticized the Romanian legislation in force at that time because it does not strictly regulate either firearms use during police operations or the training of such operations.

The Court assessed that the use of lethal force was excessive and eliminated the Romanian Government defence that alleged that the policeman in question had actually been attacked by the complainant with a knife and therefore acted in self defence, the Romanian government did not provided sufficient evidence to sustain this defence.

In conclusion, the Court found violations of Article 2 from material perspective. The Court also found violations of Article 2 of procedural perspective because the Romanian state has not developed in the wake of May 2000 events any effective investigation, able to identify and punish those responsible, the investigation against the officers concerned being finalized with a solution not to prosecute.

The Court also found violations of Article 13 (right to an effective appeal) together with Article 2 of the European Convention because, due to favourable solution of the policeman not to be prosecuted, the complainant could not initiate a civil action for damages.

The European Court has ruled a violation of Article 3 of the European Convention regarding the two other claimers and concluded that being kept in police headquarters during the night of 19 to May 20 without water and food is degrading treatment contrary to the Convention stipulations.

In this regard, I consider that the internal law is not fully consistent with the case. In internal law,

through the Law no. 295/2004 stipulations, the Law no. 17/1996 regarding the regime of firearms and ammunitions [11] points out within Article 47 that „Persons who are equipped with firearms can use them to fulfil duties or military missions in the following situations:

- a) for restraining criminals, that after committing a crime, attempt to flee;
- b) against any means of transportation used by persons referred to within letters b) and c), and against their executives who refuse to stop at empowered regulatory bodies signals, strong hints that they committed a crime or a crime is imminent being obvious;
- c) for the restraint or detention of individuals with regard to which evidence or clues that have committed a crime and retorts, or tries to fight back with weapons or other objects that may endanger the life or physical integrity of person;
- d) to prevent the escape from legal escort or the escape of legally detained persons;”

Although articles 49 and 51 of the same law regulate the conditions under which weapons may be used, it must be noticed that Romanian law makes no distinction based on the nature of the offense which is suspected „the trying-to-escape criminal of”, from the danger he poses to the state agencies or others. Also, according to Romanian law, the final purpose of using the weapon is catching the „criminal” [12]

### **2.1.3 The absolutely necessary force to repress, according to the law, riots or insurrection**

As noted in the literature, it is an extremely serious circumstance, such as to cause substantial damage to both people and goods.

It is not necessary for the authorities to be in self-defence, the hypothesis does not overlap the one from letter a). Former Commission considered that the „legal definition of insurgency” is a matter on which there may be differences in law and practice of the Member States. Similar with other notions from the Convention, it must be considered as being „self-governing”, and hence according with the Commission and ECHR interpretation.” [13] Possibility to use lethal force for the suppression of violent events is regulated, in Roman law, by the law 60/1991, regarding the organization and conduct of public assemblies, which provides in Article 17 that „If the public meetings shall cease to be peaceful, the police and gendarmerie forces will intervene to prevent or neutralize the events seriously disturbing public order and peace, endangering the life, physical integrity of citizens,

state forces or threatening with ravages or property and other public or private goods demolishing.”

Thus, not always the lack of „peaceful and civilized nature” of a meeting which „seriously disturbs public order and peace” is equivalent to a „violent disorder” or an „insurrection”.

Police intervention is carried out under Articles 18-24 of the same Law, the police (...) using personal technical endowment, in relation with the law and specific situations. With regard to the provided endowment, in case *Gulec vs. Turkey* [14] (using a machine gun from a tank to disperse a demonstration), the court held that „a balance must be found between the aim and the means used to achieve it. The gendarmes used a very powerful weapon because it seems they were not equipped with batons, shields and water cannons, rubber bullets or tear gas. The lack of such equipment is harder to understand and accept that, as Government stated, Şırnak province (note – where the demonstration was taking place) is a region where state of emergency was declared, and at that time a disorder was expected.”

The use of lethal weapons against „isolated groups of people or individuals seeking to enter the premises without the right or the perimeters of the authorities and public institutions” is allowed by Article 47 of Law no. 17/1996 on the regime of firearms and ammunition [15] Where this is not „violent event”, and from such uses, it may be caused a persons death, Romanian law can be questioned with relation to consistency with the Convention.

### **2.2 The absolute necessity of the use of force**

In regard to the condition that the use of force is absolutely necessary, referred to it within Article 2, decision *McCann v. Great Britain* [16] the Court stated that (...) from the systematic interpretation of Article 2 results that its paragraph 2 does not define only the situations in which intentional killing is allowed, but describes when it is possible to „use of force”, which can cause involuntary killing. The use of force must still be absolutely necessary for achieving one of the above-mentioned objectives (...). Using the term „absolutely necessary” within Article 2, paragraph 2, indicates that a criterion must be applied more strictly and compelling than that normally used to determine whether state intervention is „necessary in a democratic society”; under paragraph 2 Articles from 8 to 11 of the Convention. The force used must be strictly proportionate to the particular mentioned goals in paragraph 2, letters a), b) and c) of Article 2. [17]

Thus, Article 2 are applicable in cases where a persons death is caused with direct or indirect intention by state agencies, and also where is the result of „unintentional” action of the authorities.

### 3 Control of the Court

In assessing proportionality, the strict control of the Court [18] takes into account not only the action of state agents, but also all the circumstances of the case. Accordingly, the Court will consider for action purpose, danger to human life or their physical integrity or risk to produce victims by using force [19] The strict control regards not only the acts of performing an action, but also the organization - preparation and control - of an operation that caused somebody’s death. [20] The court examines whether the authorities were vigilant enough to minimize the recourse to lethal force, were „not negligent in the selection of measures taken” and took into account - as they should – the right to life of suspects. [21] In another form, the Court considers „necessary to examine whether the operation was planned and controlled by the authorities, so as to minimize, to the greatest extent possible, recourse to lethal force. The authorities should take appropriate measures to minimize the risk of loss of life. Court must also consider whether authorities were negligent in their choice of action.”

### 4 Conclusion

From all above-presentations results the necessity to introduce new regulations regarding the use of fire-arms within Romanian legislation, which must comply with ECHR jurisprudence. The well-grounded negative obligation of the state to avoid excessive use of legal force, through its agents, meaning that the use of force must be absolutely necessary to achieve the respective goals, must be the result of a new internal regulation aiming to limit the doubt and ambiguity of the situations when use of fire-arms against individuals is necessary.

#### References:

- [1] ECHR, Case *McCann and others vs. Great Britain*, Decision from September 27<sup>th</sup>, 1995
- [2] *ECHR Convention*, paragraph 2: “Deprivation of life should not be as inflicted in contravention of this article when it results from use of force which is no more than absolutely necessary:

- α. in defense of any person from unlawful violence;
- β. in order to affect a lawful arrest or to prevent an escape of a person lawfully detained;
- χ. in action lawfully taken for the purpose quelling a riot or insurrection.

- [3] ECHR, Cases no 43577/98 and 43579/98, *Nachova and others vs. Bulgaria*, Decision from February 26th, 2004
- [4] J.-F. Renucci, *European Law of Human Rights Treatise*, Hamangiu Publishing House, Bucharest, 2009
- [5] C. Bulai, *Guide of Penal Law, General Section*, Juridical Univers Publishing House, Bucharest, 2007
- [6] N. Giurgiu, *General Penal Law*, Cantes Publishing House, 2nd Eddition, Iași, 2000
- [7] C. Bîrsan, *Eropean Convention of Human Rights*, C.H. Beck Publishing House, Bucharest, 2005
- [8] ECHR, Cases no. 43577/98 and 43579/98, *Nachova and others vs. Bulgaria*, Decision from February 26th, 2004
- [9] ECHR, Cases no. 43577/98 and 43579/98, *Nachova and others vs. Bulgaria*, Decision from February 26th, 2004
- [10] ECHR, Case no. 24329/02, *Soare and others vs. Romania*, Decision from February 22<sup>nd</sup>, 2011
- [11] Law no. 17/1996 regarding the regime of fire-arms and ammunition, from 02/04/1996, published in Official Monitor, Part I, no. 74, from 11/04/1996, art. 145 paragraph 2 of Law no. 295/2004 from 28/06/2004, published in Official Monitor, Part I no. 583, from 30/06/2004
- [12] It seems that the wording of the legislature - „offenders who, after committing a crime”; - could pose problems in terms of the presumption of innocence.
- [13] ECHR, *Case of Ramsahai and others vs. The Netherlands*, May 15<sup>th</sup>, 2007
- [14] ECHR, *Case Gülec vs. Turkey*, Decision from December 14th, 2000
- [15] Law no. 17/1996 regarding the regime of fire-arms and ammunition, from 02/04/1996, published in Official Monitor., Part I, no. 74, from 11/04/1996.
- [16] ECHR, Case *McCann and others vs. Great Britain*, Decision from September 27th, 1995
- [17] ECHR, Case *Andronicou and Constantinou vs. Cyprus*, October 9th, 1997; ECHR, Case no.

21594/93, *Oğur v. Turkey*, Decision from May 20th, 1999

[18] ECHR, Case no. 38361/97, *Anguelova vs. Bulgaria*, June 13rd, 2002

[19] ECHR Commission, *Wolfram vs. West Germany*, Decision from October 6th, 1986

[20] ECHR, Case *McCann and others vs. Great Britain*, September 27th, 1995

[21] ECHR, Case *McCann and others vs. Great Britain*, September 27th, 1995

All decisions mentioned within References are public and can be accessed on the Court website:

[www.echr.coe.int](http://www.echr.coe.int)